TAN CHEONG POH & ANOR

v

TEOW AH KEOW

COURT OF APPEAL, KUALA LUMPUR
DATO' VC GEORGE JCA
DATO' ABU MANSOR ALI JCA
DATO' KC VOHRAH J
[CIVIL APPEAL NO: A-02-155-1994]
11 SEPTEMBER 1995

CIVIL PROCEDURE: *Damages – Appeal – When may appellate Court disturb trial judge's assessment – Whether trial judge acted on wrong principle of law – Whether a wholly erroneous estimate of damage – Award for pain and suffering and loss of amenities slightly low – Whether manifestly low – Whether appellate Court should increase award*

DAMAGES: *Personal injuries – Disabilities arising from one and same injury – Brain damage – Physical and intellectual disabilities – Whether to make lump sum award – Or separate awards and allow for overlap – Principles applicable – Whether there are exceptions – Distinct remoteness between disabilities arising from different injuries*

DAMAGES: *Quantum – Head injury – Fracture of skull and parietal bone – Brain damage – Pain and suffering and loss of amenities – Reduction of marriage prospects*

DAMAGES: *Quantum – Future loss of earnings – Whether to consider prospective future salary increments – Whether precluded by s 28A(2)(c)(ii) of Civil Law Act 1956 – Whether use of direct multiplication method proper – Whether annuity tables should be applied – Rationale for applying annuity tables*

DAMAGES: *Quantum – Multiplier – Selection – Distinction between Malaysian and English practices – Whether to consider 'contingencies' and 'advance payment' as factors in reducing actual working years – Whether 'advance payment' factor met by use of annuity tables – Whether there is double deduction – Whether realistic to presume respondent would give up gainful employment upon marriage*

DAMAGES: *Quantum – Nursing care – Provided by parent – Whether award should be less – Whether to compensate respondent for true value of nursing services needed – Whether respondent adequately compensated – Whether award reasonable for engaging full-time domestic maid*

DAMAGES: *Quantum – Pre-trial loss of earnings – Whether to take into account possibility of salary increments – Whether precluded by s 28A(2)(c)(ii) of Civil Law Act 1956 – Effective date of legislation – Whether cause of action had arisen*

In the Court below, the plaintiff ('the respondent') had sought damages for the personal injuries she suffered in a collision between two motor cycles, one ridden by herself and the other by the first defendant ('the first appellant') who was a servant/agent of the second defendant ('the second appellant'). The main injury suffered by the respondent was a fracture of the skull and parietal bone, resulting in damage to the brain. These injuries left her with permanent and severe residual neurological disabilities.

Between the parties, it was agreed that liability would be apportioned, with the appellants liable to the extent of 60%. In the result, damages were assessed (100%) by the trial judge as follows: (i) RM88,134 for special damages, viz, RM41,650 for pre-trial loss of earnings, RM4,998 for pre-trial loss of employer's EPF contributions, RM39,900 for pre-trial nursing care, and RM1,586 as agreed special damages; and (ii) RM232,060.75 for general damages, viz, RM100,000 for pain and suffering and loss of amenities (including reduction of marriage prospects), RM63,000 for future loss of earnings, RM7,560 for post-trial loss of employer's EPF contributions, and RM61,500.75 for future nursing care.

The appellants appealed and the respondent cross-appealed. For the respondent, it was contended that the trial Judge had under-assessed the general damages for pain and suffering and loss of amenities including the reduction of marriage prospects. It was also submitted that the respondent had suffered both physical and intellectual impairment and, therefore, the trial judge should have assessed the general damages under this head separately for physical impairment and intellectual impairment and, thereafter, aggregate up the two awards and make a reduction or an allowance in respect of overlapping. In respect of pre-trial loss of earnings and future loss of earnings, it was argued that the trial judge had erred in refusing to take into account the probability that the respondent would have been given annual salary increments. The trial Judge's computations were based on the respondent's salary at the time of the accident, ie, RM350 per month.

For the appellants, it was contended that the trial judge was wrong in employing the direct multiplication method instead of applying the annuity tables in his computation in respect of future loss of earnings. Additionally, it was argued that the multiplier of 15 years should have been further reduced to compensate for the fact that the respondent was a woman of marriageable age who would have got married and would probably have ceased to work upon her marriage. In respect of pre-trial as well as future nursing care, it was argued that the

respondent did not and would not need all of the services of a full-time maid and, consequently, the awards should not have been based on the wages of a full-time maid.

Held:

Per VC George JCA (delivering the judgment of the Court):

[1a] It has been long established that in a claim for damages for personal injuries the Court awards a lump sum. The principle of scaling down the total sum assessed for several disabilities on the ground of overlapping is too well established to be disregarded. Thus, where the disabilities stem from one injury, the extent of overlap will be such that there would be a merger. The practice of making separate assessments for the different disabilities that arise from the same injury and then to make a reduction or an allowance for overlapping is wrong. Unless there is a distinct remoteness between the disabilities and pain and suffering that arise from different injuries, the approach in assessing damages for pain and suffering and loss of amenities should be towards awarding one lump sum.

[1b] In the instant case, all the disabilities (whether physical and/or intellectual) suffered by the respondent emanated from the same injury, ie, brain damage; consequently, the trial judge was right in making a lump sum award – instead of separate awards for physical and intellectual disabilities with an allowance for overlapping.

[1c] It is trite that an appellate court should not give preference to its own figure simply because it disagrees with the figure arrived at by the trial judge; it will only interfere if it is satisfied that the trial judge has acted on a wrong principle of law or has made a wholly erroneous estimate of the damage suffered. Thus, in the instant case, while the award of RM100,000 for pain and suffering and loss of amenities was perhaps on the low side, it was not so manifestly low that the Court should interfere with it and increase the amount.

[2] In his assessment on pre-trial loss of earnings, the trial Judge should have taken into account the possibility of increments in respect of the respondent's salary, perhaps on an *ad hoc* basis if not annually. The trial judge had fallen into error in taking, as he did, the view that he was precluded, by s 28A(2)(c)(ii) of the Civil Law Act 1956 ('the CLA'), from considering any prospective increments in the respondent's earnings in the future. Section 28A(2)(c)(ii) of the CLA came into effect on 1 October 1984, which was well after the cause of action in the instant case had arisen in 1982. Consequently, the award under this heading was increased from RM41,650 to RM47,600, being assessed on the basis of RM400 per month instead of RM350 per month.

[3a] In assessing future loss of earnings, the trial judge was wrong on two counts, *viz*, in failing to take into account the prospect of increments in the respondent's earnings in the future, and in employing the direct multiplication method instead of applying the annuity tables. The award under this heading should have been assessed on the basis of RM500 per month, instead of RM350 per month, for 15 years from the date of the trial.

[3b] The rationale for using the annuity tables was that the award was to be given on a lump sum basis and not in monthly instalments of RM500 for 15 years. Thus, the annuity tables had to be used to determine a sum which, if awarded at the judgment date and invested to give a return of about 5% per annum, would provide the respondent with RM500 a month for 15 years. If the annuity tables were applied, as they should have been, the sum arrived at would be approximately RM63,000 which, coincidentally, was also the sum awarded by the trial judge, albeit on a wrong principle. If the annuity tables were not used, the respondent would have obtained an amount that was greater than that with which the court had wanted to compensate her.

[4] In selecting the appropriate multiplier, the Malaysian practice, as distinct from the English practice, has always been to consider 'contingencies' and not 'advance payment' as a factor in reducing the actual working years. The lump sum advance payment factor is met by the use of the annuity tables. Thus, there is no double deduction, and there is nothing wrong with the Malaysian practice.

[5] To further reduce the multiplier of 15 years, to compensate for the possibility that the respondent would have given up gainful employment upon her marriage, would be inconsistent with the realities of modern living in the 80's in Malaysia.

[6] On nursing care, the courts have always compensated plaintiffs for the true value of the services that they need even though the services are provided by a parent or relative. The award for care and nursing should not be less even if the plaintiff is looked after at home, and compensation can be given in money for services rendered by parents. In the instant case, the evidence on the respondent's condition, as supported by objective medical opinion, suggested that she would not be adequately compensated unless a reasonable sum to engage a full-time domestic maid was provided. Thus, the trial judge's assessments on pre-trial and future nursing care were not disturbed.

[Trial judge's award for pain and suffering and loss of amenities upheld; award for pre-trial loss of earnings increased to RM47,600; and awards for pre-trial and future nursing care, and future loss of earnings maintained.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Gantirugi – Rayuan – Bilakah boleh Mahkamah rayuan mengganggu taksiran Hakim perbicaraan – Samada Hakim perbicaraan bertindak atas prinsip undang-undang yang salah – Samada suatu angaran gantirugi yang silap keseluruhannya – Award untuk kesakitan dan penderitaan dan kehilangan kemudahan adalah agak sedikit – Samada nyata terlalu rendah – Samada Mahkamah rayuan seharusnya meningkatkan award*

GANTIRUGI: *Kecederaan diri – Ketakdayaan berbangkit daripada kecederaan yang sama – Kecederaan otak – Ketakdayaan fizikal dan intelektual – Samada untuk membuat award sekaligus – Atau award yang berasingan dan membenarkan pertindihan – Prinsip-prinsip yang terpakai – Samada terdapatnya kecualian – Kepencilan nyata antara ketakdayaan-ketakdayaan yang berbangkit daripada kecederaan yang berbeza*

GANTIRUGI: *Kuantum – Kecederaan kepala – Retakan tengkorak & tulang parietal – Kecederaan otak – Kesakitan dan penderitaan dan kehilangan kemudahan – Pengurangan prospek untuk berkahwin*

GANTIRUGI*: Kuantum – Kehilangan pendapatan sebelum perbicaraan – Samada harus mengambilkira kemungkinan kenaikan gaji – Samada terhalang oleh s 28A(2)(c)(ii) Akta Undang-Undang Sivil 1956 – Tarikh berkuatkuasa perundangan – Samada kausa tindakan telah berbangkit*

GANTIRUGI: *Kuantum – Kehilangan mata pencarian masa hadapan – Samada akan menimbangkan bakal kenaikan gaji pada masa akan datang – Samada terhalang oleh s 28A(2)(c)(ii) Akta Undang-undang Sivil 1965 – Samada penggunaan cara pendaraban secara langsung adalah wajar – Samada sifir anuiti seharusnya terpakai – Rasional bagi pemakaian jadual anuiti*

GANTIRUGI: *Kuantum – Pendarab – Pilihan – Perbezaan antara amalan Malaysia dan Inggeris – Samada harus menimbangkan "contingencies" dan "pembayaran" sebagai faktor-faktor dalam pengurangan tahun-tahun bekerja yang sebenar – Samada berlakunya penolakan berganda – Samada realistik untuk membuat tanggapan responden akan berhenti daripada pekerjaan yang menguntungkan setelah berkahwin*

GANTIRUGI: *Kuantum – Penjagaan kejururawatan – Disara oleh ibu-bapa – Samada award seharusnya kurang – Samada harus memberi pampasan kepada responden bagi nilai sebenar perkhidmatan kejururawatan yang diperlukan – Samada responden diberi pampasan dengan secukupnya – Samada award wajar bagi pengambilan khidmat seorang pembantu rumah sepenuh masa*

Dalam Mahkamah di bawah, plaintif ('responden') telah memohon gantirugi bagi kecederaan diri yang telah beliau alami dalam satu perlanggaran antara dua buah motosikal, satu daripadanya ditunggang oleh beliau dan yang sebuah lagi oleh defendan pertama ('perayu pertama') yang merupakan pengkhidmat/ejen defendan kedua ('perayu kedua'). Kecederaan utama yang dialami oleh responden adalah retakan tengkorak dan tulang parietal, yang mengakibatkan kerosakan kepada otak. Kecederaan-kecederaan ini telah menyebabkan beliau mengalami ketakdayaan "residual neurological" yang teruk dan kekal.

Antara pihak-pihak tersebut, telah dipersetujui bahawa tanggungan akan diagihkan, dengan perayu-perayu tersebut menjadi bertanggungan sehingga kepada had sebanyak 60%. Hasilnya, gantirugi telah ditaksirkan (100%) oleh Hakim perbicaraan seperti berikut: (i) RM88,134 untuk gantirugi khas, iaitu, RM41,650 untuk kehilangan mata pencarian sebelum perbicaraan, RM4,998 bagi kehilangan caruman KWSP pekerja sebelum perbicaraan, RM39,900 untuk penjagaan kejururawatan sebelum perbicaraan dan RM1,586 sebagai gantirugi khas yang telah dipersetujui; dan (ii) RM232,060.75 untuk gantirugi am, iaitu, RM100,000 bagi kesakitan dan penderitaan dan kehilangan kemudahan (termasuk kekurangan prospek untuk berkahwin) RM63,00 untuk kehilangan mata pencarian di masa hadapan, RM7,560 untuk kehilangan caruman KWSP pekerja selepas perbicaraan dan RM61,500.75 untuk penjagaan kejururawatan di masa hadapan.

Perayu-perayu telah merayu dan responden telah membalas rayuan. Bagi responden, ianya telah ditegaskan bahawa Hakim perbicaraan telah terkurang taksir akan gantirugi am untuk kesakitan dan penderitaan dan kehilangan kemudahan termasuk pengurangan prospek berkahwin. Adalah juga dihujahkan bahawa responden telah mengalami kelemahan intelektual serta fizikal dan dengan itu, Hakim perbicaraan seharusnya telah membuat taksiran bagi gantirugi am di bawah tajuk atau kepala ini secara berasingan untuk kelemahan intelektual dan kelemahan fizikal dan selepas itu menjumlahkan kedua-dua award tersebut dan membuat satu pengurangan atau potongan bagi pertindihan. Berhubung dengan kehilangan mata pencarian sebelum perbicaraan dan kehilangan mata pencarian di masa hadapan, telah dihujahkan bahwa Hakim perbicaraan telah tersalah pertimbangan kerana enggan untuk mengambilkira kebarangkalian bahawa responden mungkin telah diberikan kenaikan gaji tahunan. Pengiraan Hakim perbicaraan adalah berdasarkan gaji responden pada waktu kemalangan tersebut, iaitu sebanyak RM350 sebulan.

Bagi perayu pula, telah dihujahkan bahawa Hakim perbicaraan adalah salah dalam menggunakan cara pendarapan terus dan bukannya memakai sifir anuiti dalam pengiraannya berhubung dengan kehilangan mata pencarian masa hadapan. Tambahan lagi, telah dihujahkan bahawa pendarab 15 tahun seharusnya dikurangkan lagi bagi mengimbangi hakikat bahawa responden tersebut adalah seorang wanita yang layak untuk berkahwin yang mungkin telahpun berkahwin dan berkemungkinan telah berhenti kerja setelah berkahwin. Berhubung dengan penjagaan kejururawatan pra-perbicaraan dan di masa

hadapan telah dihujahkan bahawa responden tidak dan tidak akan memerlukan perkhidmatan seorang pembantu rumah sepenuh masa dan dengan yang demikian, award-award tersebut seharusnya tidak diasaskan atas gaji seorang pembantu rumah sepenuh masa.

Diputuskan:

Oleh VC George HMR (menyampaikan penghakiman Mahkamah):

[1] Telah lama ditetapkan bahawa dalam sesuatu tuntutan untuk kecederaan diri Mahkamah mengawardkan satu pampasan sekaligus, Prinsip mengurangkan jumlah keseluruhan yang ditaksirkan bagi beberapa ketakdayaan atas alasan pertindihan telah lama terpakai untuk tidak dihiraukan. Dengan itu di mana ketakdayaan tersebut berpunca daripada satu kecederaan, had tindihan adalah sedemikian rupa hingga ianya merupakan satu pencantuman. Amalan membuat taksiran ynag berasingan untuk ketakdayaan yang berlainan berbangkit daripada satu kecederaan yang sama dan kemudiannya membuat satu pengurangan atau potongan untuk pertindihan adalah satu amalan yang salah. Kecuali berlakunya keterpencilan antara ketakdayaan-ketakdayaan tersebut dan kesakitan serta penderitaan yang berbangkit daripada kecederaan yang berbeza, pendekatan dalam menaksirkan gantirugi bagi kesakitan dan penderitaan serta kehilangan kemudahan-kemudahan seharusnya ke arah memberikan award secara sekaligus.

[1b] Dalam kes semasa, kesemua ketakdayaan (sama ada fizikal dan/atau intelektual) yang dialami oleh responden datang daripada kecederaan yang sama, iaitu, kecederaan otak, akibatnya, Hakim perbicaraan adalah betul dalam membuat award sekaligus - dan bukannya award-award yang berasingan bagi ketakdayaan fizikal dan intelektual dengan keizinan untuk pertindihan.

[1c] Ianya sudah perkara biasa bahawa Mahkamah rayuan tidak seharusnya memberikan keutamaan kepada angkanya yang tersendiri semata-mata kerana ianya tidak bersetuju dengan angka yang dicapai oleh Hakim perbicaraan; ianya akan hanya mencampuri jika ianya berpuashati bahawa Hakim perbicaraan telah bertindak atas prinsip undang-undang yang salah atau telah membuat anggaran yang secara keseluruhannya salah bagi gantirugi yang dialami. Dengan itu, dalam kes semasa ini, sementara award sebanyak RM100,00 untuk kesakitan dan penderitaan serta kehilangan kemudahan-kemudahan agak kurang, ianya tidak terlalu kurang hinggakan Mahkamah seharusnya mencampurinya dan meningkatkan jumlah tersebut.

[2] Dalam taksirannya bagi kehilangan mata pencarian sebelum perbicaraan, Hakim perbicaraan seharusnya telah mengambil kira kemungkinan kenaikan gaji responden, mungkin atas dasar ad hoc jika tidak secara tahunan. Hakim perbicaraan telah salah dalam menimbangkan

sepertimana yang telah beliau lakukan, bahawa beliau terhalang oleh s. 28A(2)(c)(ii) Akta Undang-Undang Sivil 1956 ('CLA tersebut'), daripada menimbangkan apa-apa bakal kenaikan pada mata pencarian responden di masa hadapan. Seksyen 28A(2)(c)(ii) CLA mula berkuatkuasa pada 1 Oktober 1984, yang mana jauh selepas kausa tindakan dalam kes semasa ini berbangkit dalam tahun 1982. Akibatnya, award di bawah kepala ini telah dinaikkan daripada RM41,650 kepada RM47,600 yang ditaksirkan berdasarkan RM400 sebulan dan bukannya RM350 sebulan.

[3a] Dalam menaksirkan kehilangan mata pencarian di masa hadapan, Hakim perbicaraan tersalah dalam dua keadaan, iaitu, kegagalan untuk mengambilkira prospek kenaikan mata pencarian responden di masa-masa akan datang dan dalam menggunakan cara pendarapan terus dan tidak memakai sifir-sifir anuiti. Award di bawah kepala ini seharusnya ditaksirkan atas dasar RM500 sebulan dan bukannya RM350 sebulan selama 15 tahun daripada tarikah perbicaraan tersebut.

[3b] Rasional bagi penggunaan sifir anuiti adalah bahawa award tersebut hendaklah diberikan atas dasar sekaligus dan bukannya dalam bentuk ansuran bulanan sebanyak RM500 selama 15 tahun. Dengan itu, sifir anuiti haruslah digunakan bagi menentukan satu jumlah yang mana, jika diawardkan pada tarikh penghakiman dan dilaburkan untuk mendapatkan pulangan sebanyak lebihkurang 5% setahun, akan memberikan responden pendapatan sebanyak RM500 sebulan bagi tempoh selama 15 tahun. Jika sifir anuiti tersebut digunakan sepertimana sepatutnya, jumlah yang tercapai adalah lebihkurang RM63,000 yang mana, secara kebetulan, adalah juga jumlah yang diawardkan oleh Hakim perbicaraan, walaupun atas prinsip yang salah. Jika sifir anuiti tidak digunakan responden mungkin telah mendapatkan satu jumlah yang lebih banyak daripada yang hendak Mahkamah berikan sebagai pampasan kepadanya.

[4] Dalam memilih pendarapan yang lebih wajar, amalan di Malaysia sepertimana yang berbeza daripada amalan Inggeris adalah selalunya untuk menimbangkan "contingencies" dan bukannya "advance payment" sebagai satu faktor bagi mengurangkan tahun-tahun bekerja yang sebenarnya. Faktor pembayaran secara sekaligus dicapai dengan penggunaan sifir anuiti. Dengan itu, tidak terdapat potongan berganda dan tidak terdapat apa-apa yang salah berhubung amalan di Malaysia itu.

[5] Untuk mengurangkan pendarab selama 15 tahun, bagi menampung kemungkinan bahawa responden akan berhenti dari pekerjaan yang menguntungkan setelah berkahwin, akan menjadi tak konsisten dengan realiti kehidupan moden dalam tahun lapan puluhan di Malaysia.

[6] Berhubung dengan penjagaan kejururawatan, Mahkamah selalunya memberikan pampasan kepada plaintif bagi nilai yang sebenarnya untuk perkhidmatan yang mereka perlukan walaupun perkhidmatan tersebut diberikan oleh ibu-bapa atau saudara-mara. Award untuk penjagaan dan kejururawatan tidak seharusnya kurang walaupun plaintif dijaga di rumah dan pampasan boleh diberikan dalam bentuk wang bagi perkhidmatan yang diberikan oleh ibubapa. Dalam kes semasa ini, keterangan mengenai keadaan responden, sepertimana yang disokong oleh pendapat objektif perubatan, menyarankan bahawa beliau tidak akan diberikan pampasan yang secukupnya kecuali satu jumlah yang wajar diperuntukkan bagi mengambil kerja seorang pembantu rumah sepenuh masa. Dengan itu, taksiran Hakim perbicaraan penjagaan kejururawatan sebelum dan selepas perbicaraan tidak diusik.

[Award Hakim perbicaraan untuk kesakitan dan penderitaan dan kehilangan kemudahan-kemudahan dikekalkan; award untuk kehilangan mata pencarian sebelum perbicaraan dinaikan kepada RM47,600; dan award untuk penjagaan kejururawatan sebelum perbicaraan dan sesudahnya dan kehilangan mata pencarian di masa hadapan adalah dikekalkan]

Cases referred to:
Pattan a/l Sembadayan v Periasamy s/o Vellan [1988] 1 CLJ 826 ***(foll)***
Choy Yin Khoon v Lee Joo Kam and Anor [1988] 1 CLJ 795 ***(foll)***
Phua Jee Suan v Nila Vasu Pillai [1973] 1 MCJ 186 ***(foll)***
*Mahamad bin Mohamad Said & Anor v Perianayagam & Anor [1972] 1 MLJ 67****(foll)***
Jasi Alam v Nohya bin Mustar & Anor [1975] 1 MLJ 166 ***(foll)***
Ngooi Ku Siong v Aidi Abdullah [1985] 1 MLJ 30 ***(foll)***
Lai Wee Lian v Singapore Bus Service [1978] Ltd, [1984] 1 MLJ 325 ***(refd)***
Murtadza bin Mohd Hassan v Chong Swee Pian [1980] 1 MLJ 216 ***(dist)***
Moriarty v McCarthy [1978] 2 All ER 213 ***(dist)***
Siti Rahmah bte Ibrahim v Marappan [1989] 1 CLJ 252 ***(foll)***
Taylor v British Omnibus Co [1975] All ER 1107 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s 28A(2)(c)(ii)

Other sources referred to:
Mallal's Supreme Court Practice 2nd Edn para 57/1/13

For the plaintiff/respondent – Harpal Singh Grewal; M/s A.J. Ariffin, Choo & Harpal
For the defendant/appellant – Guy Vareghese; M/s Shahriza Vareghese & Chandran

JUDGMENT

VC George JCA:

In this matter my learned brothers Dato' Abu Mansor Ali, HMR, and Dato' KC Vohrah, HMT having seen this judgment in draft have informed me that they concur with it. Accordingly this judgment will be the judgment of the Court.

In this judgment the parties will be referred to in the manner they were referred to in the Court below. The plaintiff had sought damages arising from personal injuries suffered as a result of a collision that had occurred on or about 6 October 1982 between two motor cycles, one ridden by the plaintiff and the other by the 1st defendant admittedly the servant or agent of the 2nd defendant. At the time of the accident the plaintiff was an unmarried woman. She was 23 years of age and had been employed for a couple of years as a clerk/accounting machine operator by a company called Taiping Tyre Sdn Bhd at Taiping, Perak. Her starting salary had been RM350 per month and at the time of the accident in her third year of employment she was still earning only RM350 per month. Her employer had contributed RM40 per month to the Employers' Provident Fund to the account of the plaintiff.

The main injury suffered by the plaintiff was a fracture of the skull and parietal bone resulting in damage to the brain. Although she made a recovery of sorts from the injuries sustained by her, the plaintiff was left with permanent severe residual neurological disabilities which we will go into some greater detail later in this judgment.

In respect of liability the parties had agreed that the 1st defendant had been negligent but that there had been contributory negligence on the part of the plaintiff. It was agreed that liability be apportioned, the defendants to be liable to the extent of 60%.

For the trial there were agreed documents which included a medical report from the General Hospital, Kuala Lumpur to which hospital the plaintiff had been referred and transferred to from the Taiping District Hospital, and another by Dato' Dr Loh Thiam Ghee a consultant neurologist and physician who had on 10 June 1991 evaluated the state of the plaintiff. The plaintiff herself did not testify. Her mother did as did the general manager of the company she had been working for when the accident occurred.

The learned trial Judge assessed the damages at 100% as follows:

1) Special Damages:	RM
(a) Pre-trial loss of earnings	41,650
(b) Pre-trial loss of employer's EPF contributions	4,998
(c) Pre-trial nursing care	39,900
(d) Agreed special damages	1,586
	88,134

2) General Damages:

(e) Pain and suffering and loss of amenities (including reduction of marriage prospects)	100,000
(f) Future loss of earnings	63,000
(g) Post-trial loss of employer's EPF contributions	7,560
(h) Future nursing care	61,500.75
	232,060.75

What was before us was an appeal and cross-appeal. In this judgment we propose dealing with the questions posed to us without following the sequence in which the grounds of appeal were settled or the submissions made.

There was a difference of opinion between the parties and their respective legal advisers in respect of the extent of the disabilities the plaintiff was left with. For the plaintiff it was contended that the learned trial Judge under-estimated it. That, it is suggested is the inference to be drawn from the assessment of general damages he had made of RM100,000 "for pain and suffering and loss of amenities including reduction of the prospects of marriage." Encik Harpal Singh Grewal contended, as he put it, that the plaintiff suffered both physical impairment and intellectual impairment. His submission was that the learned Judge should have assessed damages under this head separately for physical impairment and for intellectual impairment and thereafter in aggregating the two amounts make a reduction in respect of overlapping.

Dato' Dr. Loh's report relied on by the parties and by the Judge sets out the plaintiff's "severe neurological disabilities" at the time he examined her in June 1991 as follows:

i) Slowness in her mental response.

ii) She can only count up to 10 without difficulties.

iii) She could not minus 7 from 100 serially.

iv) Her speech was slow and slurred though appropriate.

v) She had no abnormal behaviour. She dressed well and oriented to her environment. Her memory for dates and times was good.

vi) Her greatest disability was her control of her limb movement. Despite having power, she was not able to control the movements and this made her walk with her feet apart and very unsteady. She needed a tripod and occasionally some help. This had also caused her to have difficulty when performing tasks for her daily living.

vii) She had no problems with micturition and defaecation.

viii) She had no evidence of dementia.

ix) She had no fits now though the EEG showed diffuse slow waves indicating disturbed brain function. There was no evidence of any tendency to fits.

x) She had improved since the accident. She would be unlikely to improve further and her handicaps would be permanent. She would be unable to lead a fully independent life. Her mobility would be restricted. She would need someone to assist her in certain specific tasks eg going up and down the stairs and in and around the kitchen during mealtimes.

Curiously and perhaps inconsistently the doctor went on to state the plaintiff showed evidence of "mild intellectual impairment". The plaintiff's mother had testified that the plaintiff needed assistance to go to the toilet, to bathe and to change her clothes. She obviously told Dr Loh about this as can be inferred in the reference to it made by him, in writing the history of the patient as a preamble to his findings. The doctor's opinion was that the plaintiff's disabilities are permanent. We also note that all the disabilities suffered by the plaintiff stem from that one injury, the damage to the brain. Particularly for that reason we do not agree with Encik Harpal Singh Grewal's submission that the learned Judge erred in not having made a separate assessment each for physical disabilities and for intellectual disabilities and thereafter allow for overlap. In our judgment, particularly where the disabilities stem from the one injury as is the case here, all the disabilities being neurological in nature, the extent of overlap will be such that there would be a merger as it were. We note with respectful approval the learned Judge in *Pattan a/l Sembadayan v Periasamy s/o Vellan* [1988] 1 CLJ 826 in effect declining an invitation by the plaintiff's Counsel to assess different disabilities suffered by the plaintiff seperately where they all stemmed from the same brain injury. In *Pattan's* case where the injuries suffered and the disabilities resulting therefrom of a 32-year-old male were almost akin to that suffered by the plaintiff in the instant case, the amount awarded for pain and suffering and loss of amenities (in February 1987) was RM75,000. In February 1984 Edgar Joseph Jr J as then was, in *Choy Yin Khoon v Lee Joo Kam and Anor* [1988] 1 CLJ 795 in our respectful opinion properly, declined an invitation to make separate awards for different disabilities arising from the same brain injury and awarded to a male plaintiff aged 44 years (at the time of accident) RM80,000 where the disabilities were severe but not, it seems to us, as severe as those in the case of *Pattan* or of the instant plaintiff.

In Singapore, as can be seen from the judgment of their Court of Appeal (*infra),* the Deputy Registrar was persuaded by Counsel for the plaintiff in *Phuah Jee Suan v Nila Vasu Pillai* to award a separate amount for each of six injuries suffered by the plaintiff. On appeal to the High Court the Chief

Justice sitting as a puisne Judge held that that approach in assessing damages for pain and suffering and loss of amenities was wrong. There was a further appeal to the Court of Appeal in whose judgment reported in [1973] 1 MLJ 186, Choor Singh J said at p 188:

> We agree with the Chief Justice that the method suggested by Counsel for the plaintiff and adopted by the Deputy Registrar was entirely wrong. It has been long established that in a claim for damages for personal injuries the Court awards a lump sum based a number of elements or aspects.
>
> The most authoritative pronouncement on the requirement that the award should be a lump sum, will be found in *H West & Son Ltd v Shepard*, [1964] AC 326 where Lord Pearce said, at p 365:
>
> > ...If a plaintiff has lost a leg, the Court approaches the matter on the basis that he has suffered a serious physical deprivation, no matter what his condition of temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb – if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment... These considerations are not dealt with as separate items but are taken into account by the Court in fixing one inclusive sum for general damages.
> >
> > When there are several injuries, it is not proper to add up what each would be worth separately; there is likely to be some overlap because much of the general handicap and discomfort may be common in both eg detention in hospital, inability to move about or enjoy recreation. No doubt the combined effect of several injuries may be more than the sum of each taken separately, as where both arms are handicapped, but usually the effect is the other way. The principle of scaling down the total sum assessed for several injuries on the ground of overlapping is too well established for it to be disregarded. It was reaffirmed and applied recently in *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006. In that case there were two injuries, one was an injury to the neck and the other to an ankle and it is difficult to imagine two more remote injuries. In applying the principle of overlapping, Eveleigh J said at p 1011:
> >
> > > In so far as the injury to the ankle is concerned, I find it difficult to value it in isolation because it does, to a measure, overlap the other injury in the sense that the loss of amenities of life and discomfort experienced by the plaintiff resulted from two simultaneous operating causes... It would therefore be wrong in my view to value the second injury as though the first had not taken place and then to add the two figures together.

In *Mahamad bin Mohamad Said & Anor v Perianayagam & Anor* [1972] 1 MLJ 67 Suffian FJ, as he then was, speaking for the Federal Court said at p 68:

> With respect we do not think that the learned Judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v Autocar and Transporters Ltd* [1968] 1 All ER 726, 733. There is an element of overlapping when two or more injuries are suffered simultaneously.

It is to be noted that the Federal Court did not take the view that all that needs to be done was to make allowance for the overlap. The Court set aside the award of the High Court and substituted it by a lump sum award.

In 1975, Hashim Yeop A Sani J as he then was, in *Jasi Alam v Nohya bin Mustar & Anor* [1975] 1 MLJ 166 cited and followed *Mahamad (supra)* to say at p 167:

> The injuries are so connected that a lump sum compensation for pain and suffering should be awarded.

That an allowance for overlapping is not good enough was the opinion of the Federal Court expressed in *Ngooi Ku Siong v Aidi Abdullah* [1985] 1 MLJ 30 where it was said at p 31:

> In assessing damages under this head the learned Judge classified the injuries under four separate items. The first item relates to facial injuries which include three fractures, loss of nine teeth apart from extensive bruises and swelling over the right half of the face, as described earlier. The learned Judge made separate awards for the fractures and the other injuries under this item for which she arrived at the sum of RM31,500 but deducted RM5,500 for overlapping and awarded RM26,000 as damages.
>
> In examining this award we confined ourselves to the question whether the Judge had applied the correct principle or whether the assessment of damages was perverse (per Salleh Abas FJ as he then was, in *Lim Eng Kay v Jaafar bin Mohd Said* [1982] 2 MLJ 156, 158 and *Rasidin bin Partorjo v Federick Kiai* [1976] 2 MLJ 214. We are of the opinion that the fractures and the other connected injuries should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation. (*Mahamad bin Mohamed Said & Anor v Perianayagam & Anor*). The learned Judge, however, gave allowance for overlapping. Although the principle applied was incorrect, we are of the view that the award of RM26,000 under this head is in no way manifestly excessive or unreasonable.

Unless there is a distinct remoteness between the disabilities and pain and suffering arising from different injuries eg an injury to the genitals in a man resulting in impotency and say a fractured jaw resulting in difficulty in

masticating food, the approach in respect of assessing the damages for pain and suffering and loss of amenities should be towards awarding one lump sum.

The Court was advised that the amount being awarded to quadraplegic plaintiffs for pain and suffering and loss of amenities had gone up to some RM180,000 and on that basis, it was submitted that the instant plaintiff should have been awarded between RM140,000 and RM150,000. While we are prepared to say that the RM100,000 awarded under this head was perhaps on the low side we do not think it should have been anywhere near RM140,000. However we also do not think that the RM100,000 was so manifestly low that this Court should increase the amount. It is trite that the appellate Court should not give preference to its own figure simply because it disagrees with the figure arrived at by the trial Judge; it will only interfere if it satisfied that the Judge has acted on a wrong principle of law or has for other reasons made a wholly erroneous estimate of the damage suffered – see *Mallal's Supreme Court Practice* 2nd Edn para 57/1/13. Applying that test in the instant appeal, in our judgment this Court should not interfere with the trial Judge's award of RM100,000 for pain and suffering and loss of amenities.

Now, the learned Judge in computing the pre-trial loss of earnings of the plaintiff based it on RM350 a month which was the salary she was paid at the time of the accident. There was evidence provided by the general manager of the company that she had worked for, that had she continued to work for the company there would have been annual increments as a result of which he speculated that by 1 September 1992 (date of trial) she might have been paid RM550 per month. However the learned Judge was of the view that the plaintiff should be compensated for the 119 months from date of accident to date of trial at only RM350 per moth. He appeared to accept that there would have been some increments had she been able to and had continued to work for the company but he refused to take into account that probability. This was because he thought he was precluded from doing so by the amendment to the Civil Law Act that resulted in there being the new s 28A(2)(c)(ii) which provides that in awarding damages for loss of future earnings the Court should take into account only the amount relating to claimant's earnings at the time she was injured and "shall not take into account any prospect of earnings... being increased at some time in the future." What was overlooked by the learned Judge was that the said amendment was only in effect from 1 October 1984 which was well after the cause of action arose in this case in 1982.

In rectifying this error made by the trial Judge in respect of the computation of pre-trial loss of earnings (we have been invited to do so by the cross appeal) we do not think that we should assume that the plaintiff would have enjoyed an increment of RM20 for each of the years from October 1982 up to the trial of the action. It is to be noted that she had in fact not been given an increment for the second year or even the third year of her employment and there does not appear to have been any salary structure or some scheme in

respect of increments. In the light of the general manager's evidence tested against the fact that even in the third year of her employment there had been no increment, what the trial Court should have done was to hold that there could have been increments in some years given on an *ad hoc* basis. And some allowance has to be made for contigencies – she might have fallen ill, her services may have been terminated and so on. Doing the best we can we would compute the pre-trial loss of earnings at say RM400 for the 119 months to get, on a straight multiplication, RM47,600 which, as the Judge acted on a wrong principle, is what we would allow under this head in substitution for the RM41,650.

In respect of future loss of earnings the learned Judge had agreed with Counsel on both sides of the Bar that the plaintiff's retirement age should be taken as 55 years which gave 22 years from date of trial (which, contrary to the submission of Counsel for the defendants is the date from which the number of years should be computed in respect of loss of future earnings and not from date of accident because pre-trial loss of earnings is provided under another head of damages). From this 22 years the learned Judge properly deducted $^1/_3$ for contingencies to have 15 years as a multiplier which the learned Judge applied to the loss of earnings at RM350 per month in a direct multiplication (as opposed to using annuity tables) to obtain RM63,000. We think he was wrong on two counts. First, he should have directed to his mind to and should have given an allowance for increments, and secondly he should have applied the annuity tables. For the period of working life after the date of trial, there would have been other increments of salary albeit put into effect on an *ad hoc* basis. On the evidence available we think it would be fair for the purposes of computation of the lump sum to be awarded for loss of future earnings to use RM500 as the amount that the defendants should compensate the plaintiff for loss of future earnings for each month from date of trial for the period of the 15 years which was the multiplier accepted by the learned trial Judge. The rationale for using the annuity tables is that since the order to be made is not that the defendants pay the plaintiff RM500 each month for the next 15 years but a lump sum paid in advance to cover the whole 15 years, the Court has to assess what is the amount that should be ordered to be paid to the plaintiff at the date of the judgment which if invested to give a return of say 5% per annum would provide RM500 per month to the plaintiff for 15 years at the end of which period both the principal amount and all accrued interest would have been used up. What the annuity tables used in our Courts show is what such an amount is and for RM500 for 15 years the amount is RM62,280 which we round off to RM63,000 which coincidently was the amount awarded by the Judge. It is interesting to note that on a direct multiplier the amount would be RM90,000 from which the income alone on an investment at 5% pa would be RM4,500 per year or almost RM400 per month which pointedly demonstrates that unless the annuity tables are used the plaintiff would get something substantially more than the amount that the Court wanted to compensate her with.

Our attention was drawn to the judgment of the Privy Council in the Singapore case *Lai Wee Lian v Singapore Bus Service [1978] Ltd*, [1984] 1 MLJ 325 where Lord Fraser of Tullybelton delivering the judgment of the Board recommended the English practice of taking into account both the factors, contigencies and advance payment, in selecting the appropriate multiplier. If both these factors had been taken into account in arriving at the multiplier, we respectfully agree that it would be a case of double deduction if in computing the amount the annuity tables were used in the manner we have applied them instead of using a direct multiplication. Such an error indeed appears to have been made (as was pointed out in the Lord Fraser judgment at p 329 of the report) by Chang Min Tat FJ in *Murtadza bin Mohd Hassan v Chong Swee Pian* [1980] 1 MLJ 216 where the nine actual working years left to a 46-year-old, plaintiff was reduced to seven years "for contigencies and **for the fact that he would be getting a lump sum**" (Emphasis added). However that case was an exception to the rule *vis-a-vis* the Malaysian practice which has always been that the only factor taken into consideration in reducing the actual working years is contigencies. The lump sum accelerated payment factor is met by the use of the annuity tables. It follows that there is nothing wrong with the Malaysian practice. There is no double deduction.

For the defendants it was contended that the multiplier of 15 years should have been further reduced to allow for the fact that the plaintiff is a woman of marriagable age on the ground that there was the probability that she would have married. *Moriarty v McCarthy* [1978] 2 All ER 213 at 217 was cited where Justice O'Connor refers to the principle as follows:

> If the plaintiff had been a man of 24 with an agreed net loss of earnings of £1,820 a year, nobody would quarrel with applying to it a multiplier of 15 and arriving at £27,500. When one is dealing with a young woman, it is said that a multiplier of 15 is too great, and the reason that that is said is this: if you look at the reality of the immediate pre-accident position, there was a girl who was working and earning money, but the probability was that in a given number of years, nobody can say how many, she would probably have got married, and not necessarily stopped working at once, but probably within a reasonable time have participated in the bearing and rearing of a family, and that at that time it is reasonably certain that she would have had to give up gainful employment outside the home, at least for a number of years. It is those considerations which led the Court to say that for a young woman it is wrong to apply the same multiplier to this head of damage as for a man.

In that case which involved a young Irish woman, who had come out from Dublin to work in England and where she was involved in the accident that had left her a paraplegic, the Judge reduced the 15 years multiplier he would have applied to a man to 11 years to allow for the factor that had she not been disabled there was the probability that she would have married and ceased, at least after some time, earning a living. That was a 1977 judgment. Although the judgment is silent on it, it would seem that the Judge took judicial

notice of factors peculiarly relevant to the case before him: that young Irish women come out to England to earn enough to put aside sufficient amounts to have a dowry, and thereafter return to rural conservative Ireland to get married and once married and when the children came, ceased employment. We are not prepared to accept that in the 80's in Malaysia, a Chinese woman who marries would cease gainful employment as the children arrived. That was probably what young Irish women would have done in the United Kingdom in the 70's and what Malaysian women may have done in by-gone decades – but not in the 80's. Even if it may have been relevant one or two decades ago to make some allowance for such a factor, to do so in these modern times is inconsistent with the realities of modern living.

We now come to the question of compensation for nursing care. The learned Judge accepted the plaintiff's mother's evidence that since the plaintiff left the hospital on 5 March 1989 "she has had to help her daily in making her toiler, washing her clothes and feeding her". He went on to hold:

> Since leaving the hospital, were it not for her mother and sister, the plaintiff would have needed domestic help to assist her in her needs of daily living, and that that would be so for the rest of her life. Compensation must be given for the services rendered by her mother and sister just as if a domestic help had been engaged to assist her. (see *Siti Rahmah binti Ibrahim v Marappan a/l Nallau Koundar & Anor* [1989] 1 CLJ 252). I agree with the learned Counsel for the plaintiff that RM350 is a fair sum for the monthly cost of engaging a domestic help, particularly one to look after a physically handicapped person.

The objective medical evidence supports this finding. Dato' Dr Loh found that "though she had now recovered she was incoordinated with her hands and unsteady when she walked... she would be unable to lead a solely independent life because of these disabilities. These are permanent." The lack of coordination of muscular action of the hands and legs provides corroboration of the mother's evidence of the plaintiff's inability to wash and cook and use the toilet and bathe without assistance. No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the Courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative – see *Moriaty v McCarthy (supra)* at 219. In *Siti Rahmah bte Ibrahim v Marappan* [1989] 1 CLJ 252 at 255/256 Dato' Abdul Malek Ahmad J relied on and followed *Taylor v British Omnibus Co* [1975] All ER 1107 where it was held that the item for case and nursing should not be less if the plaintiff is looked after at home and that is was settled in England that compensation can be given in money for services rendered by parents. Justice Abdul Malek went on to award RM350 per month for the cost of caring for the 23-year-old female trainee teacher (which was what she was at the time of the accident) from Tanjong Malim, Perak who had become a quadriplegic as a result of brain injury.

In the instant case also the learned Judge thought that RM350 was a fair sum to pay for domestic help. There was the unchallenged evidence of the plaintiff's mother that they had sought the services of a maid and had been prepared to pay RM300 to RM400 per month but there were no takers. For the defendant it was argued that the plaintiff did not need all the services that a maid could provide. The suggestion appeared to be that an amount somewhat less than what a full time maid has to be paid should be adequate compensation. In our judgment a person who cannot cook for herself, needs assistance to go to the toilet, to bathe and to even go in and around the kitchen during meal times not to speak of going up and down the stairs (which is the opinion of Dato' Dr. Loh) is not adequately compensated under the head of nursing care unless a reasonable amount to engage at least a domestic maid on full time basis is provided. The RM350 per month awarded by the trial Judge is, in the context of the evidence, about right. In respect of future nursing care the learned Judge properly used the annuity tables and on the correct basis that the plaintiff could be expected to live up to age 60 but that an allowance should be made for contigencies. The appeal in respect of this award by the Judge fails.

That leaves two items to be resolved in respect of both of which Counsel before us have come to an agreement. It is agreed that:

(i) interest should be at 8% pa from date of judgment until realisation in respect of the whole of the amounts awarded and;

(ii) that the agreed special damages was in fact RM2,000.

Accordingly we would uphold the trial Judge's award of RM100,000 for pain and suffering and loss of amenities.

As to the award of RM41,650 for pre-trial loss of earnings we would increase it to RM47,600.

In respect of future loss of earnings, although the approach taken by the learned Judge was erroneous, for reasons different from that which influenced the Judge, we have come to the identical amount awarded by him under his head, of RM63,000 and accordingly that award will not be disturbed.

The defendants fail in their appeal against the amount awarded for pre-trail and post trial nursing care.

By consent the agreed special damages will be increased to RM2,000 and the whole of the award will carry interest at 8% pa from the date of judgment until realisation.

Since each side had a measure of success and a measure of failure in their respective appeals we would order that each party bear its own costs of this appeal and cross appeal.

There will be orders in the above terms.

Because of the brain damage suffered by the plaintiff we direct that the amount of the award made herein be paid to the solicitors for the plaintiff who will hold it in trust and forthwith upon such payment seek directions from the Court as to how the money is to be applied.

Reported by Gan Peng Chiang